

University of Groningen

Consequences of Brexit for international agreements concluded by the EU and its Member States

Wessel, Ramses A.

Published in:
Common Market Law Review

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2018

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Wessel, R. A. (2018). Consequences of Brexit for international agreements concluded by the EU and its Member States. *Common Market Law Review*, 55(2/3), 101-131.

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

CONSEQUENCES OF BREXIT FOR INTERNATIONAL AGREEMENTS CONCLUDED BY THE EU AND ITS MEMBER STATES

RAMSES A. WESSEL*

Abstract

The impact of Brexit on the external relations of the EU and the UK runs the risk of receiving less attention because of the difficult internal negotiations on the future of the UK-EU relationship. Yet, the legal complexities related to the fact that the UK will no longer be part of the EU's external relations regime are equally challenging, and increasingly present themselves now that "Brexit day" approaches. The present contribution analyses the consequences of Brexit for the UK to negotiate and conclude new international agreements, as well as the impact of the UK's withdrawal on existing international agreements concluded by the EU and its Member States with almost all States in the world.

1. Introduction

Most studies on Brexit, or on withdrawal from the European Union in general, focus on either the ways in which this can be done, or on the possible future relationship between the United Kingdom and the EU.¹ The same holds true

* Professor of International and European Law and Governance, University of Twente, The Netherlands. The article was finalized during my stay as a Visiting Fellow at the European University Institute, Florence. Credits are due to Adam Łazowski as some of the ideas have been developed together with him in earlier projects. See in particular Łazowski and Wessel, "The external dimension of withdrawal from the European Union", (2017) R.A.E- L.E.A., 623–638. Thanks also to the reviewers of this journal for their very helpful comments and suggestions.

1. See recently some contributions to Closa (Ed.), *Secession from a Member State and withdrawal from the European Union: Troubled membership* (Cambridge University Press, 2017); Eeckhout and Frantziou, "Brexit and Article 50 TEU: A constitutionalist reading", 54 CML Rev. (2017), 695–733; "Editorial comments: Withdrawing from the 'ever closer union'?", 53 CML Rev. (2016), 1491–1499; and Van der Wel and Wessel, "The Brexit roadmap: Mapping the choices and consequences during the EU/UK withdrawal and future relationship negotiations", (2017), CLEER Papers. Compare also, *inter alia*, Tatham, "Don't mention divorce at the wedding, darling!: EU accession and withdrawal after Lisbon", in Biondi, Eeckhout and Ripley (Eds.), *EU Law after Lisbon* (OUP, 2012), p. 128; Hofmeister, "Should I stay or should I go? – A critical analysis of the right to withdraw from the EU", 16 ELJ (2010), 589; Łazowski, "Withdrawal from the European Union and alternatives to membership", 37 EL

for the Guidelines adopted by the EU in relation to the negotiations with the UK.² This should not come as a surprise. After all, in relation to Brexit in particular it is not easy to disentangle a close and long-lasting relationship and at the same time find ways to hold on to elements of that relationship. Other contributions in this special issue testify to that.

The focus of the present contribution is on a different dimension of withdrawal that is less often part of the debate:³ the consequences for international agreements concluded by the European Union and its Member States.⁴ While the external dimension of withdrawal has also been addressed by others,⁵ new questions continue to emerge and deserve legal attention. *Prima facie*, the situation is clear: from the moment of withdrawal the United Kingdom will no longer be bound by existing EU agreements with third countries. However, this is easier said than done and there are many different types of international agreements; all with their own legal complexities.⁶ Moreover, EU rules continue to apply to the UK until 29 March 2019, 23:00 GMT⁷ and both EU law and international law have something to say on the

Rev. (2012), 523; Nicolaides, "Withdrawal from the European Union: A typology of effects", 20 MJ (2013), 209; Rieder, "The withdrawal clause of the Lisbon Treaty in the light of EU citizenship: Between disintegration and integration", 37 *Fordham International Law Journal* (2013), 147; Łazowski, "EU Withdrawal: Good business for British business?", 22 EPL (2016), 115.

2. The various Guidelines are cited *infra* notes 49 and 51.

3. See e.g. Fabbrini (Ed.), *The Law & Politics of Brexit* (OUP, 2017). While this volume contains a chapter on "The UK Trade Regime with the EU and the World", it does not specifically address existing and new international agreements.

4. See in general on EU international agreements: Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (OUP, 2013); and Wessel, "The European Union as a party to international agreements: Shared competences, mixed responsibilities", in Dashwood and Maresceau (Eds.), *Law and Practice of EU external relations – Salient features of a changing landscape* (Cambridge University Press, 2008), pp. 145–180.

5. On the external dimension of Brexit see, *inter alia*, Bosse-Platière and Flaesch-Mougin, "Brexit et action extérieure de l'Union européenne", (2016) RTDE, 759; Odermatt, "Brexit and international law: Disentangling legal orders", 31 *Emory International Law Review* (2017), 1051–1073; Van der Loo and Blockmans, "The impact of Brexit on the EU's international agreements", CEPS Commentary (2016), available at <www.ceps.eu/publications/impact-brexit-eu-s-international-agreements>.

6. Thus, for instance, the UK is also expected to withdraw from the Agreement on the European Economic Area (EEA) between the EU (and its Member States) and three EFTA States, Iceland, Liechtenstein and Norway. See on the legal complexities in this particular situation, Hillion, "Brexit means Br(EEA)Xit: The UK withdrawal from the EU and its implications for the EEA", 55 CML Rev. (2018), 135–156.

7. UK Prime Minister Theresa May said the EU Withdrawal Bill would be amended to formally commit to Brexit at 23:00 GMT on 29 March 2019 available at <www.bbc.com/news/uk-politics-41936428>.

possibilities to withdraw from existing international agreements or to remain a party.

A first question to be addressed is what the international position of the UK will be during and after the withdrawal process (section 2). Secondly, the consequences for existing international agreements (concluded by the EU only, or by the EU and its Member States together, or by Member States themselves) needs to be addressed (section 3).

2. External competences of the UK before and after withdrawal

Leaving the EU implies that the international legal position of the UK will have to be reset and certain dimensions of its statehood will have to be reactivated. In practical terms, it will no longer be able to rely on the EU's expertise in international trade (including in the WTO) and it will have to seriously upgrade its own delegations in international organizations, in which it was mainly active as an EU member.⁸ In other words, in many international settings the UK will have to face the reality of a major shift, that is the transition from an EU to a non-EU Member State. This, *inter alia*, entails that the UK may have to negotiate a large number of international agreements, including – or perhaps above all – the so called “EU only” agreements to which the Member States are not a party in their own right. This section will briefly highlight relevant elements of the division of external competences, before analysing the possibilities for the UK to replace the existing agreements, both during and after the process of withdrawal.

2.1. *The division of competences*

As indicated above, the United Kingdom will remain an EU Member State until the formal date of departure.⁹ This implies, first of all, that all existing international agreements will remain binding on the UK, either through international law or through EU law. The EU treaty database currently lists over 1100 international agreements concluded by the EU and/or Euratom with countries around the world, ranging from trade and economic issues to human

8. See Kaddous (Ed.), *The European Union in International Organizations and Global Governance: Recent Developments* (OUP, 2015); Wessel and Odermatt (Eds.), *Research Handbook on the EU's Engagement with International Organisations* (Edward Elgar Publishing, 2018; forthcoming). See also Bosse-Platière and Flaesch-Mouglin, *op. cit. supra* note 5.

9. Compare Art. 50(3) TEU: “The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”.

rights and the environment.¹⁰ The division of competences would usually¹¹ be reflected in the nature of the agreements: “EU only” agreements (to which the Member States are not party in their own right) or “mixed agreements” (to which both the EU and its Member States are contracting parties).¹² Secondly, as an EU member, the UK will remain bound by the division of external competences as laid down in the treaties and as clarified by the Court of Justice of the European Union in its extensive case law on this matter. Students of EU external relations law are very well aware of the fundamental role this division of competences plays in defining not only to what extent the EU can fulfil the global ambitions laid down in provisions such as Article 3(5) and Article 21(3) TEU, but also in clarifying the scope of Member States’ external competences.¹³ Text books point to the importance of the link between the internal and the external dimension and the impact of increased

10. See <www.ec.europa.eu/world/agreements/default.home.do>. The database allows a search for bilateral or multilateral agreements in relation to the specific activities of the Union.

11. There may be political reasons to come to another conclusion. Thus, in relation to CETA, EU Trade Commissioner Cecilia Malmström said: “From a strict legal standpoint, the Commission considers this agreement to fall within exclusive EU competence. However, the political situation in the Council is clear, and we understand the need for proposing it as a ‘mixed’ agreement, in order to allow for a speedy signature.” See Commission Press release, “European Commission proposes signature and conclusion of EU-Canada trade deal”, available at <www.europa.eu/rapid/press-release_IP-16-2371_en.htm>. At the same time, mixity was avoided for the conclusion of the EU-Kosovo Association Agreement (AA). Although AAs are traditionally mixed, an EU-only agreement was concluded because several Member States wanted to avoid a *de facto* recognition of Kosovo through their national ratification procedure of the agreement. See Van Elsuwege, “The stabilization and association agreement between the EU and Kosovo: An example of legal creativity”, 22 EFA Rev. (2017).

12. While the Europa Treaties database does not allow to search for EU-only or mixed agreements specifically, one study counted 890 bilateral and 259 multilateral international treaties and agreements which the EU or the EU and the Member States have signed and/or ratified. Of these, 745 are exclusive EU competence agreements and 230 are mixed agreements. See Miller, “Legislating for Brexit: EU external agreements”, House of Common Briefing Paper, No. 7850, 5 Jan. 2017. Post-Lisbon, however, there seems to be a preference for mixed agreements. Paradoxically, despite the broadening of the Common Commercial Policy (CCP) in Lisbon Treaty, also all post-Lisbon Free Trade Agreements (FTAs) have been signed as mixed agreements. See further Van der Loo and Wessel, “The non-ratification of mixed agreements: Legal consequences and solutions”, 54 CML Rev. (2017), 735–770, at 739.

13. See recently on the division of competences Garben and Govaere (Eds.), *The Division of Competences Between the EU and the Member States: Reflections on the Past, the Present and the Future*, (Hart Publishing, 2017). Earlier publications include Davies, “The post-Laeken division of competences”, 28 EL Rev. (2003), 686–698; Dougan, “The Convention’s draft Constitutional Treaty: Bringing Europe closer to its lawyers?”, 28 EL Rev. (2003), 763–793; Craig, “Competence: Clarity, conferral, containment and consideration”, 29 EL Rev. (2004), 323–344; Tridimas, “Competence after Lisbon. The elusive search for bright lines”, in Ashiagbor, Countouris and Lianos (Eds.), *The European Union after the Treaty of Lisbon* (Cambridge University Press, 2012), pp. 50–51; Dougan, “The Treaty of Lisbon 2007: Winning minds not hearts”, 45 CML Rev. (2008), 617–703; Claes and De Witte, “Competences:

internal Union activity on Member States' possibilities to continue to play an international role.¹⁴ The rationale behind this internal-external connection is also well known: once the Member States have transferred competences to the EU in their internal relations, they have become far less interesting partners at the international level, since they are simply no longer in the position to negotiate and conclude international agreements on issues legislated internally at EU level. It is true that areas fully covered by exclusive competences are rare, but it is equally true that there are not so many areas left in which the EU members can engage in international commitments while completely bypassing the EU.¹⁵

The EU holds exclusive competences in a number of areas in its external relations. As recently further clarified by the ECJ in Opinion 2/15,¹⁶ the scope of the Common Commercial Policy is quite broad and most competences in that area (or related to CCP) are exclusive. The same goes for the Customs Union. As also further clarified by Opinion 2/15, apart from exclusivity on the basis of the Treaties (so-called "*a priori* exclusivity" or "policy area exclusivity"), exclusivity may flow from the adoption of internal Union measures and the UK would be excluded from adopting rules which affect those measures ("conditional exclusivity" or "pre-emption"). Finally, exclusive competences can occur when absolutely indispensable to achieve EU Treaty objectives, without there being internal EU measures ("exclusivity through necessity").¹⁷

As the EU has become a global actor in areas ranging from trade and investment to development and environment, international agreements concluded by it cover many areas, either grouped under more general association or cooperation agreements or provided for in sectoral treaties with third countries.¹⁸ As a consequence, Member States rely on the EU and the

Codification and contestation", in Łazowski and Blockmans (Eds.), *Research Handbook on EU Institutional Law* (Edward Elgar Publishing Ltd, 2016), pp. 46–87.

14. See e.g. and much more extensively Van Vooren and Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014), Chaps. 3–5. See for a good overview of recent case law: Erlbacher, "Recent case law on external competences of the European Union: How Member States can embrace their own treaty", (2017), CLEER Papers, available at <www.asser.nl/cleer/publications/cleer-papers/cleer-paper-20172-erlbacher/>.

15. For an overview of the areas where the EU remains active, see, *inter alia*, Keukeleire and Delreux, *The Foreign Policy of the European Union*, 2nd ed. (Basingstoke, 2014). Yet, compare De Witte, "Exclusive Member State competences – Is there such a thing?", in Garben and Govaere, op. cit. *supra* note 13, pp. 59–73.

16. Opinion 2/15 on the Free Trade Agreement between the European Union and the Republic of Singapore, EU:C:2017:376.

17. See Van Vooren and Wessel, op. cit. *supra* note 14, pp. 100–102.

18. In many cases, a general framework treaty is supplemented by sectoral agreements of sorts. For instance, EU-Georgia relations are covered by an Association Agreement (Association Agreement between the European Union and the European Atomic Energy

expertise of the European Commission to negotiate and conclude international agreements. And this is particularly the case in exclusive policy areas such as trade or fisheries, in which the role of the Member States has been marginalized. Thus, while individual EU Member States are still full members of the WTO, most of the actual work is done by the Commission. A side effect of this shift is that over the years the EU States have lost considerable expertise in international trade law and have not concluded any trade agreements in their own right. Not only in the area of trade, but in many other policy areas, the UK will indeed have no choice but “to take back control” of its own external competences once there is no longer any division of competences. Yet, as the following sections will reveal, from a legal perspective this is easier said than done.

2.2. *The competence to negotiate or conclude agreements pre-Brexit*

Article 50 TEU falls short in regulating the external effects of an exit from the EU. One of the questions that is left open is to what extent the UK can already anticipate its future role as a non-EU country.¹⁹ The British international trade secretary, Liam Fox, is reported to have said that the UK is “discussing the possible shape of new agreements” with at least 12 countries, adding that dozens more were prepared to expand their UK trading links.²⁰ And, indeed media reports indicate the attempts of the UK to discuss its future relationship with a number of third States.²¹ Given the fact that the UK will remain

Community and their Member States, of the one part, and Georgia, of the other part, O.J. 2014, L 261/4). In addition, a list of sectoral agreements concluded between the parties includes, *inter alia*, Agreement between the European Union and Georgia establishing a framework for the participation of Georgia in European Union crisis management operations, O.J. 2014, L 14/2; Agreement between the European Union and Georgia on protection of geographical indications of agricultural products and foodstuffs, O.J.2012, L 93/3; Common Aviation Area Agreement between the European Union and its Member States and Georgia, of the other part, O.J. 2012, L 321/3; Agreement between the European Union and Georgia on the readmission of persons residing without authorization, O.J. 2011, L 52/47; Agreement between the European Union and Georgia on the facilitation of the issuance of visas, O.J. 2011, L 52/34.

19. See also Wessel, “You can check out any time you like, but can you really leave? On ‘Brexit’ and leaving international organizations”, 13 IOLR (2016), 197–209. Parts of the present contribution are based on that short Editorial. Many thanks to Christophe Hillion for the valuable discussions on the points in this section. The usual disclaimer applies.

20. Henley and Rankin, “Pursuing trade pacts outside EU could mean worse Brexit deal for UK”, *The Guardian*, 25 Jan. 2017 available at <www.cdn.ampproject.org/c/s/amp.theguardian.com/politics/2017/jan/25/brexit-deal-uk-eu-trade-pacts>.

21. E.g.: “Washington trade representatives and American industry experts are due to hold a second round of ‘preliminary scoping discussions’ in London next week, after the first meetings in Washington in July”. “Trump adviser Ross says UK-US trade deal will mean scrapping EU rules”, *The Guardian*, 6 Nov. 2017 available at <www.theguardian.com/business/2017/nov/06/trump-ross-says-uk-us-trade-deal-eu-brexit-chlorinated-chicken>; “UK and US

empty-handed if it does not replace the trade agreements it currently has with third States on the basis of its EU membership, the question has indeed come up whether the UK can already start negotiating, and perhaps even concluding, agreements with other States prior to exit day.

Part of the answer may be found in Article 50(3) TEU, which is quite clear (although phrased *a contrario*) on the fact that the EU Treaties remain in force for a withdrawing country until the day of actual exit from the Union.²² Bearing in mind the complexity of withdrawal process, it has been argued that the Union should develop a special status of a withdrawing country, waiving some of the obligations linked to membership to allow it to prepare for the inevitable legal consequences of exit.²³ If nothing special is agreed upon, the UK would continue to lack competence to conclude international agreements in many areas. Article 2(1) TFEU²⁴ continues to apply, and implies that the UK will have to respect the division of competences and is refrained from adopting legally binding acts or conclude international agreements in an area of EU exclusive competence. The result is that the UK simply does not have the competence to *conclude* international agreements in the area of Common Commercial Policy, or indeed in any other area of exclusive EU competence, until it formally leaves the European Union.

Also in areas of shared competences the UK continues to be limited by the rules and principles guiding the division of competences. Again, it is helpful to make a distinction between different types of competences. In the case of so-called pre-emptive competences, Member State action is only excluded if the competence is exercised by the Union. In the case of non-pre-emptive competences the EU can fully deploy a policy, but exercising its competence does not exclude Member State action in the same field. In the realm of external relations good examples include development cooperation and humanitarian aid. A special shared (or in fact “parallel”) competence exist in relation to the Common Foreign and Security Policy (CFSP), but even in relation to that area it has been argued that Member States are far from free once the Union has acted.²⁵

to start talks on post-Brexit trade deal”, BBC News, 24 July 2017, available at <www.bbc.com/news/business-40699978> ; “No free trade deal until Brexit settled, says Australian minister”, The Guardian, 7 Sept. 2016, available at <www.theguardian.com/politics/2016/sep/07/no-free-trade-deal-until-brexit-settled-australian-minister-steven-ciobo>.

22. See *supra*, text at notes 7 and 9.

23. Łazowski, *op. cit.* *supra* note 1, 523.

24. “When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts”.

25. Hillion and Wessel, “Restraining external competences of EU Member States under CFSP”, in Cremona and De Witte (Eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, 2008), pp. 79–121.

Furthermore, while one could argue that the need for uniformity may be less pressing in situations where a Member State will be leaving anyway, it is maintained here that during the period leading up to actual withdrawal, the United Kingdom remains bound by the principle of sincere co-operation.²⁶ It is important to underline that even in cases in which Member States do have some room for external manoeuvre, the principle of sincere cooperation will have to guide their behaviour. On the basis of this principle “the Union and the member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. ... The Member States shall ... refrain from any measure which could jeopardize the attainment of the Union’s objectives.” (Art. 4(3) TEU). The effects of this principle are well documented in academic literature and may become particularly relevant in cases in which we are not dealing with the pre-emption.²⁷ The case law of the Court is quite clear on, for instance, the scope of the principle of sincere cooperation²⁸ but one should also remember that this principle works both ways. On the one hand, it can be relied upon by the European Union to stop the United Kingdom from engaging in negotiations of trade agreements with third countries. On the other hand, the same principle may be invoked by the UK arguing that since it is leaving the Union, there should be a fair degree of leverage and cooperation granted by the European Union, allowing it to prepare for a new future. We were confronted with a somewhat similar situation in Case C-45/07 *Commission v. Greece (IMO)*.²⁹ Whereas Greece had violated its duty of abstention stemming from the pre-emption doctrine, it argued that the Commission had itself failed in its duty to cooperate loyally with the Member States by not allowing discussion of Greece’s proposal in the so-called Marsec committee, a preparatory body within the Union. It thus invoked the failure of the Commission to fulfil its legal obligation with regard to the scope of Union law, as defence against its own failure with regard to Union competence. The

26. See also Larik, “Sincere cooperation in the common commercial policy: Lisbon, a ‘joined-up’ Union, and ‘Brexit’”, in Bungenberg, Krajewski, Tams, Terhechte, and Ziegler (Eds.), *European Yearbook of International Economic Law*, (Springer, 2017), pp. 83–110 at 102.

27. See e.g. Neframi, “The duty of loyalty: Rethinking its scope through its application in the Field of EU external relations”, 47 CML Rev. (2010), 323–359; Van Vooren and Wessel, op. cit. *supra* note 14, Chapt. 6.

28. One of the leading judgments was rendered in Case C-246/07, *Commission v. Sweden*, EU:C:2010:203. For an academic appraisal see, *inter alia*, Cremona, annotation of Case C-246/07, *Commission v. Sweden (PFOS)*, 48 CML Rev. (2011), 1639–1665; Van Zeven, “The principle of unity under Art. 10 EC and the international representation of the Union and its Member States – Case C-246/07, *Commission v. Sweden*”, (2010) EJRR, 301–305. More on the (im)possibilities of Member States to be active externally in areas covered by EU law see, *inter alia*, Casteleiro and Larik, “The duty to remain silent: Limitless loyalty in EU external relations?”, (2011) EL Rev., 524–541.

29. Case C-45/07 *Commission v. Hellenic Republic*, EU:C:2009:81.

Court's reply is important in the present context: it held that a breach by the Commission of the duty of cooperation (still) does not entitle a Member State to undertake actions which affect rules adopted at Union level.³⁰

Indeed, the rationale for pre-empting Member State action seems to remain valid in the context of a withdrawing State. In Opinion 1/03 the Court of Justice held that "... it is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law".³¹ The purpose of excluding Member States from acting solely has thus been to ensure effective application of EU rules through uniformity where the EU has exercised its shared powers conferred upon it, or where it possesses an *a priori* exclusive power.³² Indeed, the duty of cooperation and the principle of pre-emption are connected: pre-emption *ensures* application of EU rules through *uniformity*, whereas the duty of cooperation seeks to *facilitate* effectively attaining EU tasks and *coherent* EU international action. Phrased otherwise: when EU competences could be affected, the Member States are excluded from acting at all. Yet, when the EU Treaty objectives are at stake and there is some room for manoeuvre, this triggers an obligation of the Member States and the Union institutions to cooperate loyally.³³

Translated to the obligations of the UK in the period between the notification and exit day, one could argue that there would be some room for the EU and the UK to *jointly* seek possibilities to allow the UK to explore options for future trade deals with third countries as long as EU competences would not be affected. At the same time, it is clear, that, firstly, the division of competences, and secondly, the duty of sincere cooperation would entail that any unilateral uncoordinated actions on the side of the UK run the risk of being in violation of EU law. At least, one could argue, the principle of sincere cooperation entails a "principle of unity of representation",³⁴ leading to a need

30. Ibid., para 26. Nonetheless, the Court did take the opportunity to emphasize the reciprocal nature of the duty of cooperation. When the Union has an exclusive power, it must cooperate loyally with its Member States.

31. Opinion 1/03, *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, EU:C:2006:81. For an academic appraisal see, *inter alia*, Lavranos, "Opinion 1/03, *Lugano Convention*", 43 CML Rev. (2006), 1087–1100; Kruger, "Opinion 1/03. Competence of the Community to conclude the New Lugano Convention on the jurisdiction and the recognition and enforcement of Judgments in civil and commercial matters", 13 CJEL (2006), 189–199.

32. Case C-433/03, *Commission v. Germany*, EU:C:2005:462; Case C-266/03 *Commission v. Luxembourg*, EU:C:2005:341.

33. See more extensively Van Vooren and Wessel, op. cit. *supra* note 14, Chapt. 5; and Neframi, "The duty of loyalty: Rethinking its scope through its application in the field of EU external relations", 47 CML Rev. (2010), 323–359.

34. See Case C-246/07, *PFOS*.

for the UK and the EU to cooperate whenever third States are approached to discuss the future relationship.

In addition to all of the above, the United Kingdom will remain bound by the principle of “primacy”. This doctrine is well developed and established in the Court’s case law³⁵ and was confirmed quite expressly in the Brexit-context by the UK’s Supreme Court in the *Miller* case.³⁶ The latter held that: “Following the coming into force of the 1972 Act [European Communities Act] the normal rule is that the domestic legislation must be consistent with EU law. In such cases, EU law has primacy as a matter of domestic law”³⁷ This primacy has traditionally not been different for internal or external activities. So, until exit day the UK will have to act upon the agreed rules and principles of EU external relations law and it will not be allowed to give preference to its (newly enacted) domestic bills.

All of this will seriously hamper the UK in preparing itself for the post-Brexit period as we would be dealing with negotiations on topics that are already covered by existing EU agreements that fall, moreover, largely under the EU’s exclusive competences. In most cases the UK will simply be pre-empted from negotiating (let alone concluding) an international agreement, and will not be able to win any time by already starting formal international negotiations during the withdrawal talks with the EU.³⁸ Indeed,

35. See further Claes, “The primacy of EU law in European and national law”, in Arnall and Chalmers (Eds.), *The Oxford Handbook of European Union Law* (OUP, 2015), pp. 178–211; De Witte, “Direct effect, primacy, and the nature of the legal order”, in Craig and De Búrca (Eds.), *The Evolution of EU Law*, 2nd ed. (OUP, 2011), pp. 323–362; Capik, “Five decades since van Gend en Loos and Costa came to town: Primacy, direct and indirect effect revisited”, in Łazowski and Blockmans, op. cit. *supra* note 13, pp. 379–420.

36. *R (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

37. Ibid., para 67, available at <www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>. See also Garner, “‘So long (as) and farewell?’ The United Kingdom Supreme Court in *Miller*”, European Law Blog, 26 Jan. 2017 available at <www.europeanlawblog.eu/2017/01/26/so-long-as-and-farewell-the-united-kingdom-supreme-court-in-miller/#more-3529>.

38. Compare the remarks by HR Federica Mogherini during her visit to the USA: “... the UK will stay a Member State of the European Union for another two years at least. This also implies that it will not be able to negotiate any trade agreement bilaterally with any third country which is the case of all the Member States, not because we limit our Member States but because this is the guarantee for all Europeans that we are stronger in trade negotiations, being the second economy in the world ... and because this guarantee is that the benefit of any trade agreement goes equally to all Europeans without any internal competition so it is a form of guarantee for all Europeans and it is not a limitation”, EEAS, 9 Feb. 2017, available at <www.eeas.europa.eu/headquarters/headquarters-homepage/20408/remarks-high-representative-mogherini-press-roundtable-during-visit-united-states-america_en>.

checking out does not imply that the UK is immediately free to go its own way.³⁹

2.3 What are negotiations?

Article 2(1) TFEU (referred to above) merely seems to relate to the *adoption* of acts. While the principle of sincere cooperation may restrict Member States in affecting Union activities in that area, the question is when that would actually be the case, also given the fact that the need for uniformity is perhaps less pressing now that the UK will have another legal regime anyway.

Brexit Minister Davis argued that there is a difference between the negotiations (which would be allowed) and the actual signing of an agreement (for which a competence could not exist),⁴⁰ and in any case claimed that “preliminary discussions” between the UK and third States should be allowed.⁴¹ In the law of treaties, negotiations are defined as the first phase of a treaty-making process.⁴² Negotiations are generally carried out, or at least initiated, by the executive (that is to say, the Head of State or a minister for foreign affairs). As recently argued by de Oliveira Mazzuoli: “Negotiations of a treaty start when the representatives of States meet at a specific place and at arranged time, for the purpose of studying the possibilities to reach an agreement in connection with the conclusion of a specific international instrument in a joint manner.”⁴³ The term “negotiations” can be seen to include “every action prior to an agreement of any nature, the time of discussion and the concurrence of wills which will or will not be transformed into a legal act”.⁴⁴ This implies that any action by the executive which is aimed to investigate the possibilities to reach an international agreement could already be regarded as falling under the umbrella term “negotiations”. Admittedly, the descriptions do seem to include a certain formalized procedure, which would exclude fully informal talks preceding actual negotiations, but it is equally clear that formal talks between government representatives of the UK and third States with the aim of discussing the terms of a new agreement would easily amount to a “negotiations”.

39. Compare Wessel, op. cit. *supra* note 19.

40. Speech by Davies, House of Commons, 2 Feb. 2016 available at <www.parliamentlive.tv/event/index/bfe52708-fed8-4028-b2b8-aa8831d173cd?in=12:37:34>.

41. See May, “UK will lead world in free trade”, BBC News, 7 Sept. 2016, available at <www.bbc.com/news/uk-politics-37291832>.

42. Compare Mazzuoli, *The Law of Treaties: A Comprehensive Study of the 1969 Vienna Convention and Beyond*, (Forense, 2016), p. 89.

43. Ibid., loc. cit.

44. Ibid., loc. cit.

When it comes to EU law one has to note that the Court of Justice has occasionally been confronted with similar questions. Rather than the formalities of international negotiations, the impact on EU solidarity seems key. In Case C-433/03, *Commission v. Germany (Inland Waterway)*, the Court stated that the adoption of a decision authorizing the Commission to negotiate a multilateral agreement marks the start of a concerted action triggering the duty of cooperation.⁴⁵ In Case C-246/07, *Commission v. Sweden (PFOS)*, the Court held that the duty of cooperation was triggered the moment a Member State acts internationally in such a way that is “likely to compromise the principle of unity in the international representation of the Union and its Member States and weaken their negotiating power”.⁴⁶ And that was in a situation of shared competence. The moment any (informal) negotiations between the UK and a third State “reach a minimum threshold of specificity and could be detrimental to the EU’s own position in these negotiations”⁴⁷ the principle of sincere cooperation would be violated.

However, as mentioned before, in the case of Brexit the question of whether the European Commission has already used its competence is less relevant as in most cases we are dealing with existing EU agreements with third countries. Thus, unless a special status is given to it, the UK would run the risk of violating EU law if talks with third States would be detrimental to the EU’s own position.

One way out of all this would be if the UK would expressly be given some leeway in this area. On the basis of Article 2(1) TFEU Member States may act even in areas of exclusive EU competence “if so empowered by the Union or for the implementation of Union acts.” On the basis of this, it has been argued that “authorizing the UK to start trade negotiations with third countries would be a possibility, especially for the period after triggering Article 50 TEU, but depends entirely on the goodwill of the EU institutions and the remaining Member States.”⁴⁸ This could be done if the UK acts in close cooperation with the EU and within a given mandate.

From a more practical perspective the question emerges what would happen if the UK did violate EU external relations law before formally departing from the European Union. In a legal sense, nothing seems to stand in the way of the European Commission using its usual armoury of infringement proceedings based on Articles 258 and 260 TFEU. The same would hold true for the 27 other Member States. The Court, in turn, could use the fast track procedure in order to render a judgment before the Brexit actually takes place. Yet, in purely

45. Case C-433/03, *Commission v. Germany*.

46. Case C-246/07, *Commission v. Sweden*.

47. As phrased by Larik, op. cit. *supra* note 26, at p. 103.

48. Ibid.

political terms, any violation of EU law during the negotiations would most likely backfire and not help the UK's position and be potentially detrimental to the result it aims to achieve.

2.2. *Post-Brexit obligations*

A final question in relation to the UK's competences would be to what extent it would really be completely free to conclude international agreements *post*-Brexit. Obviously, as a non-EU Member State, the UK would no longer be restricted by the division of competences or by any principle guiding the EU and its Member States' external activities. Yet, in some situations an echo of its former membership may still affect the freedom the UK so dearly hopes for. First of all, the way in which the UK remains connected to the internal market may have some influence. While most options that are currently discussed (at least by academics) foresee a clear decoupling between the UK and the EU, participation in parts of the internal market may lead to (*de jure* or at least *de facto*) restrictions on the substantive issues the UK can agree on in international agreements with others. Thus, acceptance of EU-standards to guarantee market access will make it difficult to negotiate completely different rules for goods or services with third States. Secondly, participation in external policies, such as the Union's foreign and security policy, will result in restraints on the UK's foreign policies as it will be unacceptable for the EU and its Member States that the UK participates in Union policies (e.g. in relation to sanctions or military missions) while maintaining a different agenda outside those policies. Finally, it is not completely excluded that certain restraints may still flow from previous arrangements. Increasingly, the need for transition arrangements is mentioned to allow the UK and the EU to have more time for the rearrangements. It is thus not to be excluded that the UK, while being formally out, will still be bound by a number of transitional arrangements and hence perhaps even by some aspects of the division of competences.⁴⁹

Finally, it goes without saying that also *post*-Brexit the rules and principles on the division of competences remain intact for the remaining 27 EU

49. In that respect it is striking that neither the European Council (Art. 50) Guidelines of 15 Dec. 2017, nor the "supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union", adopted by the Council on 29 Jan. 2018, expressly refer to the external dimension of a possible transition arrangement. However, in the draft withdrawal agreement released by the Commission on 28 Feb. 2018, TF50(2018)33, some attention was paid to this, cf. Art. 124 Specific arrangements relating to the Union's external action.

Members. This also implies that the exclusive competence of the EU in trade and other matters prohibits them from engaging in any separate deals with the UK the moment this would “compromise the principle of unity in the international representation of the Union”, in the words of the *PFOS* formula mentioned above.

3. International Agreements concluded by the EU and its Member States

Apart from the possibilities to conclude *new* international agreements, the question is what will happen to *existing* agreements, or at least to the position of the UK in relation to those agreements. The many different types of international agreements do not allow for a detailed analysis, but many specific studies have already pointed to the extreme complexities in areas such as trade or fisheries.⁵⁰ Furthermore, as for instance pointed out by Odermatt, the European Council’s Guidelines are far from consistent. On the one hand, they seem to accept that after withdrawal, “[t]he United Kingdom will no longer be covered by agreements concluded by the Union or by Member States acting on its behalf or by both acting jointly.” At the same time, the Guidelines also set out that “[t]he European Council expects the United Kingdom to honour its share of international commitments contracted in the context of its EU membership. In such instances, a constructive dialogue with the United Kingdom on a possible common approach towards third country partners and international organizations concerned should be engaged.”⁵¹

This section will address the question of the post-Brexit relationship between the UK and bilateral or multilateral international agreements concluded before exit-day. A distinction is made between agreements that were concluded by the EU only (to which the Member States are not a party in their own right), mixed agreements (to which both the EU and its Member States are contracting parties), and international agreements concluded by the Member States, either *inter se* or with third States.

50. For an analysis of the many existing arrangement in the common fisheries policy, see e.g. the EP Report “Research for PECH Committee – Common Fisheries Policy and Brexit”, Directorate-General for Internal Policies, Policy Department for Structural and Cohesion Policies, Fisheries, June 2017, available at <[www.europarl.europa.eu/RegData/etudes/STUD/2017/601981/IPOL_STU\(2017\)601981_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/601981/IPOL_STU(2017)601981_EN.pdf)>.

51. European Council (Art. 50) guidelines for Brexit negotiations, 29 April 2017, para 13, available at <www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>.

3.1. *EU-only Agreements*

Agreements concluded by the EU usually apply to the territories in which the Treaty on European Union is applied.⁵² These agreements are not just concluded in the area of the Common Foreign and Security Policy,⁵³ but may also cover trade with key global partners.⁵⁴ Unless some kind of transitional regime is agreed,⁵⁵ the territory of the UK will no longer be covered by the agreements after Brexit-day. Article 216(2) of the TFEU furthermore makes clear that international agreements concluded by the EU are (arguably *only*) “binding upon the institutions of the Union and its Member States”. On the EU side the situation is therefore quite clear: international agreements concluded by the EU are no longer binding on the UK. The latter is neither bound through EU law (Art. 216(2) TFEU), nor on the basis of international treaty law (Art. 34 VCLT⁵⁶), although specific situations may occur in relation to certain AFSJ agreements for which the UK has an opt-out (see further below).⁵⁷

52. See e.g. Art. 360(1) of the 2014 Association Agreement between EU and Central American States: “For the EU Party, this Agreement shall apply to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties”; available at <www.trade.ec.europa.eu/doclib/press/index.cfm?id=689>. Or, Art. 52 of the EU-Korea Framework Agreement: “This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union is applied and under the conditions laid down in that Treaty, and, on the other hand, to the territory of the Republic of Korea; available at <www.eeas.europa.eu/archives/docs/korea_south/docs/framework_agreement_final_en.pdf>. Compare also Art. 29 VCLT, which sets out that a treaty is binding on a party in respect of its entire territory.

53. The international agreements concluded under the CFSP may be found in the EU database. See for a recent example Council Decision (CFSP) of 27 March 2017, concerning the signing and conclusion of the Agreement between the European Union and the Republic of Moldova on security procedures for exchanging and protecting classified information, O.J. 2017, L 106/1.

54. See e.g. the Agreement between the European Community and Canada on trade in wines and spirit drinks, O.J. 2004, L 35/3. Similar ones were concluded with the USA in 1994 and with South Africa in 2002. See for other examples the Agreement between the EC and Australia on trade in wine, O.J. 2009, L 28/3; or the Agreement between the European Community and the State of Israel on government procurement, O.J. 1997, L 202/85.

55. See also the European Council (Art. 50) Guidelines cited *supra* note 49. See more extensively Dougan, “An airbag for the crash test dummies? EU-UK negotiations for a post-withdrawal ‘status quo’ transitional regime under Art. 50 TEU”, in this Special Issue.

56. Art. 34 of the 1969 Vienna Convention on the Law of Treaties provides: “A treaty does not create either obligations or rights for a third State without its consent”. Art. 34 VCLT is considered a principle of customary international law and is as such also binding on the Union (Case C-386/08, *Brita v. Hauptzollamt Hamburg Hafen*, EU:C:2010:91, paras. 40–45).

57. See on the international agreements concluded in the Area of Freedom, Security and Justice (AFSJ): Matera, *The European Union as an international actor in the area of freedom, security and justice. A legal constitutional analysis* (TMC Asser Press, 2018, forthcoming).

One could perhaps argue that the EU merely concluded the agreements “on behalf of” its Member States and that the UK would thus remain bound once the competences are returned to it. Thus, it has for instance been argued in relation to the 2014 WTO Government Procurement Agreement – to which the EU is a party, but the UK is not – that “on leaving the EU, the UK will succeed to the GPA in its own right, in accordance with rules of customary international law on the succession of States to treaties, and practice under the GATT 1947, which ‘guides’ the WTO.”⁵⁸

Yet, there are some serious flaws in this argument. As a preliminary point it should be noted that the idea of the EU contracting on behalf of its Member States is linked to the notion of “succession”. The two notions should be separated. With regard to the idea that the EU acted “on behalf of” its Member States, this idea seems contradictory to the EU’s separate international legal status and its autonomous position as a global actor. The Treaty on European Union clearly presents the EU as a separate international actor and over the years it has been accepted as such (and alongside its Member States) by almost all countries in the world. Moreover, the text of the agreements does not indicate the UK (or any other Member State) as a contracting party. In many cases we are dealing with bilateral agreements and it would be difficult to simply read “the European Union” as “the United Kingdom” in those cases. Finally, as also held by Odermatt, with regard to the idea of “succession”, it is far from clear that international law accepts the succession of international organizations by former Member States. The Vienna Convention on Succession of States in Respect of Treaties, for example, applies only “to the effects of a succession of States in respect of treaties between States” and it is clear that the EU is not a State.⁵⁹

In other words, the UK will have to start from scratch, although it may in some cases aim at what could largely be a copy of the agreements that were concluded by the EU. This, of course, assumes that the other contracting parties would agree to such a solution. In fact, this should not be taken as a given. One thing is to negotiate a trade agreement with the biggest trade block in the world, quite another to negotiate it with a medium-size country on the fringes of Europe.⁶⁰ This is all the more so given the new preference in world

58. Bartels, “The UK’s Status in the WTO After Brexit”, in Schütze and Tierney (Eds.), *The United Kingdom: “Federalism” Within and Without*, 2018 (forthcoming; available at <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747>).

59. Odermatt, op. cit. *supra* note 5, at 1059. The non-state nature of the EU was confirmed by the ECJ in Opinion 2/13, *ECHR (II)*, EU:C:2014:2454, para 156.

60. Cf. also Koutrakos, “... Once the UK relied on the good will of a third country to extend these deals to a completely new context, it could not be certain that the latter party would resist the temptation to unravel specific aspects of the deal. It is difficult to envisage, for instance, the automatic rolling over of an existing trade agreement concluded by the EU without

trade for big package deals that require big markets to support them. Furthermore, in some cases copy-pasting existing agreements to adjust them for the United Kingdom would be less easy than it sounds, as many of the provisions were tailor-made for the EU-situation and may require approximation of domestic law with EU *acquis*.⁶¹

One option needs further investigation, and that is the one used in the case of opt-outs by EU members to certain agreements or arrangements. This option allows for Member States to be bound by the agreement, not on the basis of EU law, but on the basis of international law. Examples include the UK, Ireland and Denmark as regards part of the 2014 EU-Ukraine Association Agreement,⁶² the special position of these Member States in relation to the 2000 trafficking protocol to the Palermo Convention,⁶³ or Denmark's position with regard to the 2007 Lugano Convention. The latter in particular shows that it is possible to conclude an EU-only agreement to which

adjusting the quotas already applicable to trade between the UK and the third country concerned ... the rolling over of existing trade agreements, therefore, would involve renegotiation of at least some of their provisions", Monckton Chambers Blog, 6 July 2016 available at <www.monckton.com/brexit-mean-international-trade-agreements/>.

61. See e.g. Association Agreement between the EU and its Member States, of the one part, and Ukraine, of the other part, O.J. 2014, L 161/3. For an academic appraisal see, *inter alia*, Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration without Membership* (Brill Nijhoff, 2016); Emerson and Movchan (Eds.), *Deepening EU-Ukrainian Relations: What, Why and How?*, (Rowman & Littlefield International, 2016).

62. *Ibid.*, see the Preamble of the Agreement, " ... CONFIRMING that the provisions of this Agreement that fall within the scope of Part III, Title V of the Treaty on the Functioning of the European Union bind the United Kingdom and Ireland as separate Contracting Parties, and not as part of the European Union. If the United Kingdom and/or Ireland ceases to be bound as part of the European Union in accordance with Art. 4a of Protocol No. 21 or in accordance with Art. 10 of Protocol No. 36 on transitional provisions annexed to the Treaties, the European Union together with the United Kingdom and/or Ireland shall immediately inform Ukraine of any change in their position, in which case they shall remain bound by the provisions of the Agreement in their own right... The same applies to Denmark, in accordance with Protocol No. 22 on the position of Denmark, annexed to the Treaties".

63. Council Decision 2006/619/EC on the conclusion of the Protocol by the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime concerning the provisions of the Protocol, insofar as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community, O.J. 2006, L 262/51. It provides " ... this Decision is without prejudice to the position of the United Kingdom and Ireland under the Protocol integrating the Schengen *acquis* into the framework of the European Union and under the Protocol on the position of the United Kingdom and Ireland, hence the UK and Ireland are not bound by this Decision to the extent that it concerns the exercise of an external power by the Community in fields where its internal legislation does not bind the UK and/or Ireland. This Decision is without prejudice to the position of Denmark under the Protocol on the position of Denmark ... hence Denmark does not take part in its adoption and is not bound by it".

one Member State (Denmark) is a party in its own right (as are Iceland, Norway, and Switzerland).⁶⁴ While, in these cases a solution was intended to be found for EU Member States with opt-outs in certain policy areas, in a conceptual sense not much seems to stand in the way of exploring this further for a “full opt-out”.

In any case, the third countries will likely need to be notified of the fact that their respective agreements will no longer apply to a former part of the “EU’s territory”.⁶⁵ And, indeed, the “territorial scope” of international agreements concluded by the EU is not without significance. In the case of trade or investment agreements, for instance, a shrinking territory may be particularly worrisome for a third party, if only because in the case of Brexit, it loses 65 million consumers.⁶⁶ In addition, with regard to multilateral agreements in particular, other aspects, including budgetary reallocations, could become part of the deal.⁶⁷

64. As Denmark had opted out from the Brussels I Regulation, that Regulation did not apply on its territory at the time of the conclusion of the Agreement. That is why Denmark is separately mentioned as a contracting party.

65. Art. 56(2) VCLT would imply giving the respective third parties 12 months’ notice of the fact that the UK will cease to be a member of the Union and that therefore the agreement will cease to apply to its territories. As the UK is not a party, the regular termination/denunciation clauses in these agreements do not apply. For an example of a termination clause, see Art. 18(4) of the Agreement between the European Union and the Republic of Niger on the status of the EU mission in Niger CSDP (EUCAP Sahel Niger), O.J. 2013, L 242/2. For an example of a denunciation clause, see Art. 16(5) of the Agreement between the EU and the Former Yugoslav Republic of Macedonia establishing a framework for the participation of the Former Yugoslav Republic of Macedonia in EU crisis management operations, O.J. 2012, L 338/3. Some EU-only agreements even explicitly mention that the EU can only terminate the agreement “in respect of all its Member States” (see e.g. Art. 8(7) of the Agreement between the EU and the Commonwealth of Dominica on the short-stay visa waiver, O.J. 2015, L 173/21). See also Van der Loo and Blockmans, *op. cit. supra* note 5 for these examples.

66. International agreements may even have effects beyond the territory of the UK in Europe. See on the scope of EU law in relation to overseas territories recently Kochenov, “European Union territory from a legal perspective: A commentary on Arts. 52 TEU, 355, 349, and 198–204 TFEU”, in Kellerbauer, Klamert and Tomkin (Eds.), *The EU Treaties and the Charter of Fundamental Rights – A Commentary* (OUP, 2018) (forthcoming); University of Groningen Faculty of Law Research Paper, SSRN 2017-05, available at <www.ssrn.com/abstract=2956011>.

67. In the reverse situation, when a new State joins the EU, the effects for third countries are determined in the accession treaties. See e.g. Art. 6 of the Accession Treaty with Croatia, Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United

3.2. Mixed agreements

At first sight, the situation could be easier in the case of so-called “mixed agreements” (concluded by both the EU and its Member States with one or more third States or international organizations) as the UK, as one of the signatories, seems to be a “party” in its own right and bound directly under public international law.⁶⁸ Yet, in the case of bilateral mixed agreements in particular the Member States and the EU are presented as a “team”. This is often underlined by the preamble, where it provides that the agreement is concluded between the third country, of the one part, *and the European Union and its Member States*, of the other part, jointly referred to as “the Parties”.⁶⁹ Significantly, several mixed agreements include a clause defining the term “Parties” as “the Union or its Member States, or the Union and its Member States, in accordance with their respective competences, on the one hand, and [the third country], on the other”.⁷⁰ Furthermore, just as in the case of EU-only agreements (see above), mixed agreements (again primarily bilateral ones) often have territorial application clauses defined in terms of the territory of EU Member States.⁷¹

According to Article 2(1)(f)-(g) of the Vienna Convention on the Law of Treaties (VCLT), a State constitutes a “party” to an international treaty so long as it has consented to be bound by the provisions of that treaty, which continues to be in force with respect to it and which has not been terminated in conformity with its own terms or the VCLT rules on the termination of treaties. While most mixed EU FTAs contain specific provisions for the termination of their operation, they do not provide for a special termination clause in case of withdrawal of a State from the EU. For some, this leads to the conclusion that “the UK’s withdrawal from the EU will not as such affect its

Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union, O.J. 2012, L 112/10. See further, *inter alia*, Łazowski, “EU do not worry, Croatia is behind you: A commentary on the Seventh Accession Treaty, (2012) *Croatian Yearbook of European Law and Policy*, 1–30, at 32–33.

68. See, *inter alia*, Hillion and Koutrakos (Eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing, 2010); as well as Heliskoski, *Mixed Agreements as a Technique for Organizing the External Relations of the European Community and its Member States* (Kluwer Law International, 2001).

69. See e.g. the 2016 Comprehensive Economic and Trade Agreement (CETA), O.J. 2017, L 11/23.

70. E.g. Art. 55 EU-New Zealand Agreement on Relations and Cooperation O.J. 2016, L 304/1; Art. 34 EU-Canada Strategic Partnership Agreement, O.J. 2016, L 329/45 and Art. 482 of the EU-Ukraine AA (cited *supra* note 61).

71. E.g. the Agreement on the European Economic Area, O.J. 1994, L 1/3, Art. 126.

capacity as a formal ‘party’ to mixed EU FTAs.”⁷² Perhaps the better question is to what extent they will continue to *apply* to the UK.⁷³

In that respect, it is essential to recall that these are not just international agreements that the UK entered into individually, despite the remark made by Advocate General Sharpston that Member States are parties to the agreement as sovereign States, “not as a mere appendage of the European Union”.⁷⁴ As an “integral part of EU law” – in the words of the EU Court – these agreements are closely connected to other EU legislation and policies. Moreover, many mixed agreements are concluded without a strict indication of what falls under EU competences and what is still in the hands of the Member States.⁷⁵ In fact, many Council decisions only refer to the participation of Member States in the agreement alongside the Union,⁷⁶ or explain in general terms that the agreement is only concluded insofar as the agreement’s provisions fall under Union competences.⁷⁷ To distill the division of competences from the Council decision adopting the Agreement remains difficult. The Council decisions on signature and provisional application state that the listed provisions shall only provisionally apply “to the extent that they cover matters falling within the Union’s competence”.⁷⁸ Several Council decisions even explicitly state that “the provisional application of parts of the Agreement does not prejudice the

72. See also Volterra, “The impact of Brexit on the UK’s trade with non-EU Member States under the EU’s mixed free trade agreements”, Oxford Business Law Blog, 17 May 2017, available at <www.law.ox.ac.uk/business-law-blog/blog/2017/05/brexit-negotiations-series-impact-brexit-uk-s-trade-non-eu-member>.

73. Ibid., Volterra rightfully draws attention to the distinction between “entry into force” and “application”. Whilst the “entry into force” and the “application” of a treaty typically coincide, this does not necessarily have to be the case. While a treaty might be in force between two or more States, it might not be applicable with respect to a specific Party (*ratione personae*), a specific territory (*ratione loci*) or a set of events situated in time (*ratione temporis*).

74. Opinion of A.G. Sharpston in Opinion 2/15, EU:C:2016:992, para 77.

75. This was exactly what was at stake during the procedure that led to Opinion 2/15 on the allocation of competences in the Free Trade Agreement between the European Union and Singapore.

76. For example, the Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, O.J. 2010, L 23/35. It states that “both the Community and its Member States have competence in the fields covered by the UN Convention. The Community and the Member States should therefore become Contracting Parties to it, so that together they can fulfil the obligations laid down by the UN Convention and exercise the rights invested in them, in situations of mixed competence in a coherent manner”.

77. See e.g. Council Decision 94/800/EC on the conclusion of the WTO Agreement and its Annexes, which states that these agreements “are hereby approved on behalf of the European Community with regard to that portion of them which falls within the competence of the European Community”, O.J. 1994, L 336/2. For a more recent example, see Council Decision 2008/801/EC on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption, O.J. 2008, L 287/1.

78. Ibid.

allocation of competences between the Union and its Member States in accordance with the Treaties”.⁷⁹ Thus, also the provisional application does not provide a clear indication of the provisions falling under Union or Member State competences.⁸⁰ The same holds true for so-called “Declarations of competence” that may be attached to an international agreement to give third parties an indication of the responsible parties on the side of the EU. Both the dynamic character of the division of competences and the sometimes not very concrete wording do not allow for too much reliance on these declarations in defining the exact delimitation.⁸¹

One might argue that all of this is no longer relevant since the UK would become responsible for the entire set of provisions anyway, including the ones that previously fell under the exclusive powers of the EU. Yet, the problem is that on the EU-side mixed agreements were concluded by the States *as Member States* functioning within the institutional and substantive setting that governs the status and implementation of international agreements in the EU and domestic legal orders.⁸² And, in some agreements “the Member States of the European Union” are indeed referred to as such.⁸³ Elsewhere we have argued that the deletion of the UK as a party could lead to a form of

79. See e.g. Council Decision 2016/2232/EU on the signing, on behalf of the Union, and provisional application of the Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part, O.J. 2016, L 337/1. A similar formulation can also be found in Council Decision 2017/38/EU of 28 Oct. 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, O.J. 2017, L 11/1080. The Council and Member States also adopted numerous Statements and Declarations to the Council minutes in which they emphasize that the provisional application of the agreement in several areas such as transport and moral rights does not prejudice the allocation of competences between the EU and the Member States. On the various statements, see Van der Loo, “CETA’s signature: 38 Statements, a joint interpretative instrument and an uncertain future”, CEPS Commentary, 31 Oct. 2016.

80. In addition, the Council is not always clear or consistent in defining the scope of the provisional application. For examples and comments, see Van der Loo and Wessel, *op. cit. supra* note 12. The lack of a clear demarcation of competences in mixed agreements has been criticized; see Heliskoski, *op. cit. supra* note 68, p. 98.

81. See e.g. Council Decision 2017/38/EU cited *supra* note 79. On Declarations of competence, see Casteleiro, “EU declarations of competence to multilateral agreements: A useful reference base?”, 17 EFA Rev. (2012), 491–509.

82. Or, as nicely phrased by Volterra, *op. cit. supra* note 72, “where mixed agreements are framed as bilateral agreements between ‘the EU party’ and third States, the intention was presumably to grant benefits to the EU ‘as a whole’ rather than to individual Member States. Accordingly, the provisions of the FTA might not continue to apply automatically to the UK *ratione personae post-Brexit*”.

83. See more extensively Fernekeß, Palevičienė and Thadikkaran, “The future of the United Kingdom in Europe – exit scenarios and their implications on trade relations”, Graduate Institute Trade and Investment Law, Clinic Papers (2013), p. 49 available at: <www.graduate

“incomplete mixity”.⁸⁴ In any case, negotiations will be time-consuming, not only for the UK but also for all third parties. As most (at least bilateral) mixed agreements do not contain clauses on the consequences of parties, the consent of the third State(s) will be needed for the UK to be allowed to withdraw as a party (cf. Art. 54 VCLT). Unwillingness on the side of other parties may result in an interesting legal situation in which the UK would not be able to withdraw under international treaty law, despite the fact that this withdrawal may be seen as a logical consequence of Brexit under EU law. At the same time, it would be difficult to force third States to continue to accept the UK as a partner to an agreement even if this were possible. After all, the very reason that the signature of the UK was accepted may have been its EU membership. Finally, for third States, withdrawal from the EU by a treaty partner may form a fundamental change in circumstances (cf. Art. 65 VCLT).⁸⁵

Would it be possible for the UK to remain a party to a mixed agreement? Theoretically this would not be impossible.⁸⁶ International treaty law is quite flexible, as long as all parties agree. In any case, a legal instrument (e.g. a protocol) seems to be required stating that the withdrawing Member State takes over the rights and obligations it previously had under the agreement as an EU Member State and that it joins the agreement as a third party. In all likelihood, this would trigger negotiations to accommodate unforeseen practical problems. While under Treaty law it would be obvious that such a legal instrument would need to be ratified by all parties (the EU, its 27 Member States, the third party and the withdrawing Member State), practice may reveal that these protocols are concluded by the EU alone, following the example of protocols in the reverse situation, the accession of a new Member State. It is important to note that the changing status of the UK would change the nature of a bilateral agreement to a multilateral agreement.⁸⁷ Finally, in

institute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI_2013-01_LawClinic_FutureUKinEurope.pdf>.

84. Van der Loo and Wessel, op. cit. *supra* note 12, at 748.

85. Yet, see the restrictive interpretation of the principle by the International Court of Justice: “the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases”, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* Judgment of 25 Sept. 1997; cf. also Van der Loo and Blockmans, op. cit. *supra* note 5.

86. Yet, see the remarks made by Prof. Dashwood in evidence before the UK Foreign Affairs Committee: “... take the example of the free trade agreement with South Korea, which has been very favourable to the UK. The UK will not be able to – well, it could not – stay as a part. Although it is a free trade agreement, it is still a mixed agreement because it goes a little further than the core area of the common commercial policy. Nevertheless, I don’t believe that the UK could retain the rights and obligations that apply to it under the agreement ... we would have to renegotiate”, (2015), Foreign Affairs Committee, “Costs and benefits of EU membership for the UK’s role in the world”, HC 545, Q219 Q217.

87. Ibid. See also on this point, see Van der Loo and S. Blockmans, op. cit. *supra* note 5.

this respect, it should be stressed that international agreements that have not been ratified by the UK may have to be adapted. While they may already provisionally apply on the basis of the ratification by the EU, their full entry into force may depend on the ratifications of all parties.⁸⁸

With regard to mixed agreements, different considerations indeed apply to bilateral and multilateral agreements.⁸⁹ In the case of bilateral agreements (between the EU/Member States and a third party),⁹⁰ the UK would cease to be a party, but this will not happen automatically. The question is whether a simple notification to third parties would suffice, or whether renegotiations are in order. It has been argued that “in order to extract itself from a mixed agreement, the UK will need to repeal its approval act that ratified the agreement and terminate or denounce the agreement as foreseen in the agreement’s termination or suspension clause. Contrary to EU-only agreements, the UK is a contracting party to the agreement for the mixed elements of the agreement and these termination and denunciation clauses are applicable.”⁹¹ And, indeed, we may very well need arrangements “between the EU, its 27 remaining Member States and the other contracting parties, and laid down in a legally binding act”, which as an amendment of the mixed agreements “may need the consent of all involved and – depending on the format – possibly even ratification”.⁹² It is expected that all of this will form part of the withdrawal agreement, possibly on the basis of transition provisions.⁹³ It remains important to keep in mind, however, that these

88. This is not an unusual situation for international agreements and applies for instance to the EU’s FTAs with Peru and Colombia, Central America, Eastern and Southern African States, Cameroon, more Southern African States, and most Caribbean countries. See more extensively on this intermediate situation, Van der Loo and Wessel, *op. cit. supra* note 12.

89. *Ibid.*

90. The bilateral nature of these agreements is often underlined by the preamble, where it provides that the agreement is concluded between the third country, of the one part, and the European Union and its Member States, of the other part, jointly referred to as “the Parties”. Significantly, several mixed agreements include a clause defining the term “Parties” as “the Union or its Member States, or the Union and its Member States, in accordance with their respective competences, on the one hand, and [the third country], on the other”. See more extensively Van der Loo and Wessel, *op. cit. supra* note 12, at 741–742. This has also been affirmed by the ECJ in Case C-316/91, *European Parliament v. Council*, EU:C:1994:76. Interestingly, Art. 1.1 of CETA defines the parties as “the European Union or its Member States or the European Union and its Member States, within their respective areas of competence as derived from the EU Treaties (hereinafter referred to as the ‘EU Party’)”.

91. Van der Loo and Blockmans, *op. cit. supra* note 5.

92. *Ibid.*

93. See more extensively on the transition arrangements Dougan, *op. cit. supra* note 55. The currently available draft Withdrawal Agreement (28 Feb. 2018) pays attention to the external dimension of Brexit in one provision only, Art. 124, which largely extends the obligations of the UK (including the duty of sincere cooperation) throughout the transition period (<ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf>). It is interesting to

arrangements cannot simply be done unilaterally, but will have to include the respective third States.

In the case of multilateral agreements (between the EU, the Member States and a (large) number of other States), the UK could perhaps remain a party,⁹⁴ although a notification regarding the changed situation would be required and an adjustment of some of the commitments could be necessary. Indeed, it should not be excluded that also in this case the UK's continued participation may become subject to negotiations between the EU, its Member States and third countries (including the UK in a new special position). This may result in solutions on the basis of, for instance, additional Protocols or by replacing the UK's participation in a multilateral mixed agreement by a "UK only" agreement. For this reason, the withdrawal agreement may perhaps include some provisions on how to proceed in these situations, including the need for notifications and other arrangements. A transition period, allowing the UK to remain covered by certain international agreements for a certain period after Brexit, could also be envisaged (see further below).⁹⁵ In any case, it is clear that also in relation to multilateral agreements, the UK will become responsible for the implementation of all provisions, including those related to the EU's external competences. Depending on the type of agreement, this may require a number of additional domestic implementation measures as these will no longer reach the UK through EU law.

3.3. *Agreements concluded by EU Member States*

A separate category is formed by what we may perhaps term "Member States-only" agreements. Obviously, Member States have remained "States" and in areas in which they are still competent to do so, they have continued to conclude international agreements, either with third States or among themselves (*inter se*).⁹⁶ The EU treaties even expressly mention the

note that in the UK's version of a possible Withdrawal Agreement, of 20 Feb. 2018, Art. X+3 largely echoes these obligations (<www.gov.uk/government/uploads/system/uploads/attachment_data/file/682894/Draft_Text_for_Discussion_-_Implementation_Period__1_.pdf>).

94. Cf. Bartels, op. cit. *supra* note 58, who argues that "the UK already today possesses full WTO rights and obligations under the WTO multilateral trade agreements, even if these are, at present, for the most part, exercised and performed on its behalf by the EU." As indicated above, the suggestion that the Union merely acts "on behalf" of the Member States in these situations seems flawed. Compare also Ungphakorn, "Nothing simple about UK regaining WTO status post-Brexit", (2016) ITCSD Opinion, available at <www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit>.

95. See more extensively on the transition arrangements Dougan, op. cit. *supra* note 55.

96. Cf. De Witte, "Old-fashioned flexibility: International agreements between Member States of the European Union", in De Búrca and Scott (Eds.), *Constitutional change in the EU: From uniformity to flexibility?* (Hart Publishing, 2000), pp. 31–58.

competence of Member States to enter into international agreements with third countries;⁹⁷ and this competence may also be included in EU secondary legislation.⁹⁸ While, *prima facie*, these agreements are not part of the Union's legal order⁹⁹ and would thus not be affected by the withdrawal of a Member State from the EU, there may be clear links with EU law. This is particularly true when Member States are authorized by the EU to conclude international agreements, for instance in areas in which the EU is exclusively competent, but for practical reasons not able to exercise this competence.¹⁰⁰

Allan Rosas listed four main reasons why some international agreements do not count the EU among their contracting parties:¹⁰¹ 1. many agreements were concluded by Member States before they became EU members or before an EU competence in a particular area became clearly established; 2. the agreement may concern a matter that is still outside an EU competence; 3. the EU Commission or the Council may prefer, for political or other non-legal reasons, not to conclude an agreement despite the existence of a Union competence to do so and, in the case of a multilateral convention, despite the

97. See e.g. Art. 34(2) TEU; Arts. 165(3), 166(3), 167(3), and 168(3) TFEU; and Arts. 191(4), 209(2), 212(3), and 214(4) TFEU.

98. See further below (and *infra* notes 100 and 102).

99. Indeed, it is generally held that the general rules and principles of EU law are not applicable to these agreements. See Rosas, "The status in EU law of international agreements concluded by EU Member States", (2011) *Fordham International Law Journal*, 1303–1345, at 1314. Cf. also Case C-533/08, *TNT Express Nederland v. AXA Versicherung*, EU:C:2010:50. The Court "does not, in principle, have jurisdiction to interpret, in preliminary ruling proceedings, international agreements concluded between Member States and non-member countries".

100. Examples include the air service agreements, which, after a judgment by the Court, suddenly proved to be covered by the Union's exclusive competences, but need time to be replaced; see Parliament and Council Regulation 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries, O.J. 2004, L 157/7. Similar situations arose in relation to the bilateral investment treaties (BITs): see Regulation 1219/2012 of 12 Dec. 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, O.J. 2012, L 351/40-46; and with respect to European private law: see Parliament and Council Regulation 662/2009 of 13 July 2009, establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, O.J. 2009, L 200/25; and Parliament and Council Regulation 593/2008 of 17 June 2008, on the law applicable to contractual obligations (Rome I), O.J. 2008, L 177/6 and Parliament and Council Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), O.J. 2007, L 199/40.

101. Rosas, *op. cit. supra* note 99. See also Schütze, "EC law and international agreements of the Member States – An ambivalent relationship", (2006) *CYELS*, 387; Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2009); Van Rossem, "Interaction between EU Law and international law in the light of *Intertanko* and *Kadi*: The dilemma of norms binding the Member States but not the Community", (2009) *Netherlands Yearbook of International Law*, 183.

existence in the agreement of a clause enabling an integration organization like the EU to become a contracting party; and 4. a multilateral agreement may be closed to EU adherence by limiting the right to adhere to “States”. To complicate things, agreements can be concluded before and after EU membership and can, in both cases, be concluded with third countries or between Member States *inter se*.

What consequences will Brexit have on these agreements? Specific references in the treaties to agreements *inter se* (such as on the Benelux in Art. 30 TFEU) do not seem to apply to the UK. Yet, some secondary instruments also allow for specific arrangements between Member States, despite the fact that a clear link with EU law is maintained.¹⁰² A case in point is also formed by the over 150 intra-EU bilateral investment treaties (BITs). Despite the fact that the Commission works hard to make an end to BITs – in particular now that direct investments are covered by EU exclusivity – these agreements have not completely disappeared.¹⁰³ One could argue that, post-Brexit, the UK as a third State would be free to maintain its 12 existing agreements with EU Member States.¹⁰⁴ While this may be the case for the UK, it may not be the case for EU Member States. In areas such as air transport, investments, or specific parts of private law, the intention is gradually to phase out agreements concluded by Member States, and this will also affect the UK. Hence, renegotiations may be in order even for these agreements. Furthermore, the state of European integration may stand in the way of new bilateral agreements with EU Member States. Thus, it has been argued that negotiating post-Brexit bilateral arrangements in the area of free movement with selected Member States may be deeply problematic from the point of view of non-discrimination and the basic idea of European unity.¹⁰⁵

In relation to agreements concluded by the Member States and other third countries the question may also arise whether they have no effect at all on the

102. Rosas, op. cit. *supra* note 99, at 1318 refers to the “Brussels I” Regulation (Regulation 44/2001

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001, L 12/1), Rome I and II Regulations, cited *supra* note 100. In addition, some agreements are concluded outside the Union law framework to promote closer cooperation; examples include the 1985 Schengen Agreement and the 2005 Prüm Convention.

103. See Bungenberg and Reinisch, “Special issue: Legal problems of intra-EU BITs – An introduction”, (2016) JWT, 871–872, as well as other contributions to this special issue.

104. Rogers, Goodall and Dowling, “Brexit and investor-state dispute settlement”, (2017) *International Arbitration Report*, pp. 24–27. The UK has intra-EU BITs with Bulgaria, the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.

105. See Kochenov, “EU citizenship and withdrawals from the Union: How inevitable is the radical downgrading of rights?”, (2016) University of Groningen Faculty of Law Research Paper, LEQS Paper No. 111, available at SSRN, <www.ssrn.com/abstract=2797612>.

Union. After all, “[a]fter 50 years of existence, the EU has engendered a dense legal order. On occasion, its legislative activity reaches beyond the EU’s legal space and incidentally affects relations between third parties and EU members.”¹⁰⁶ It is well known that in *International Fruit*,¹⁰⁷ the Court had no difficulties in accepting a binding effect of the GATT 1947 on the Community, despite the fact that it was not a party to that agreement. Indeed, the notion of “succession” played a crucial role in that respect: competences were fully transferred from the Member States to the Community *and* this was recognized and accepted by third States.¹⁰⁸ Exceptional as this situation may be, the question is what the legal and/or practical status is of agreements in which the UK mainly acted as an “agent” of the Union as (over time) it lost competences in this area¹⁰⁹ as the Union exercised its so-called “normative control”.¹¹⁰ True, the UK remains a party in its own right, and one might argue that it simply regains its status as a full party in any practical sense now that it becomes responsible again in substantive terms. Yet, the implementation of those agreements was basically done on the basis of EU rules and in close alignment with EU law and policies. One may think of multilateral international agreements in the maritime or fisheries area, on the basis of which the UK is a member of international organizations (such as the ILO or the IMO) in which it, so far, mainly or partly acted as an agent of the Union. A recent statement of the International Tribunal for the Law of the Sea (ITLOS) is illustrative in that respect: “In cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a

106. Ličková, “European exceptionalism in international law”, (2008) EJIL, 463–490, at 466. This statement is even more pertinent after 60 years of existence.

107. Joined Cases C-21-24/72, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, EU:C:1972:115, paras.14–18; See also Schütze, op. cit. *supra* note 101, at 394–99; Van Rossem, op. cit. *supra* note 101, at 30–31.

108. Rosas, op. cit. *supra* note 99, at 1326.

109. Remember the importance of the fact that in the *ERTA* case, the ECJ recognized that the Member States “acted in the interest and on behalf of the Community.” Case C-22/70, *Commission v. Council (ERTA)*, EU:C:1971:32, paras. 80–90. And, in relation to the ILO, it held that competences “may, if necessary, be exercised through the medium of the Member States acting jointly in the Community’s interest.” See Opinion 2/91, *Convention N° 170 of the ILO*, EU:C:1993:106, para 37.

110. Cf. also Casteleiro, op. cit. *supra* note 81. This doctrine was mentioned by the Commission in the discussions on the ILC Draft Articles on the Responsibility of International Organizations: “... European Union Member States have transferred competences (and therefore decision-making authority) on a range of subject matters to the European Union. This requires special rules of attribution and responsibility in cases where European Union member States are in fact only implementing a binding rule of the international organization ... in other words, the European Union exercises normative control of the Member States who then act as Union agents rather than on their own account when implementing Union law.” ILC, Responsibility of international organizations, Comments and observations received from international organizations, Sixty-third session, UN Doc. A/CN.4/637, pp. 37–38.

fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, *the obligations of the flag State become the obligations of the international organization*.”¹¹¹ While the status of agreements concluded by the Union may be clear, the question may be raised to what extent agreements concluded by Member States are (also) part of the Union’s legal order,¹¹² in which case disentanglement from that order may be more complex than a withdrawal of a Member State would suggest. It is true that the situations that come to mind concern multilateral agreements to which all Member States are a party, but even “UK-only” agreements should not be *a priori* excluded. As an example, the UK is a signatory to 84 BITs with other countries,¹¹³ but also the Regulation on Financial Responsibility,¹¹⁴ for instance, may very well reveal issues arising over the transition, over whether the EU or UK should bear financial responsibility arising from a dispute under an international agreement.

A related question concerns the relevance of so-called “disconnection clauses”, that may have been inserted in multilateral conventions (e.g. the ones concluded in the framework of the Council of Europe) to ensure that *between* EU members the relevant provisions of Union law apply rather than the provisions of the international agreement.¹¹⁵ These clauses thus regulate the applicable law between Member States *inter se* (or between the Union and the Member States) on issues dealt with by the multilateral agreement. They are meant to solve potential conflicts between EU law and international law and preserve the autonomy of the Union’s legal order. The question of whether and how the UK should be “reconnected” after Brexit seems to be provided by the clauses themselves, which (in their quite standard form) read like this:

“Parties which are members of the European Union shall, in their mutual relations apply Community and European Union rules in so far as there are Community and European Union rules governing the particular subject

111. *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC) (“Request for Advisory Opinion submitted to the Tribunal”), Advisory Opinion of 2 April 2015, Case No. 21, para 172 (emphasis added). Compare also Tuerk, “Liability of international organizations for illegal, unreported and unregulated fishing”, (2015) *Indian Journal of International Law*, 161–176.

112. Rosas, *op. cit. supra* note 99, at 1333, pointed to some Council decisions authorizing Member States to conclude international agreements “in the interest of the Union”.

113. Rogers, Goodall and Dowling, *op. cit. supra* note 104.

114. Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, O.J. 2014, L 257/121.

115. Cremona, “Disconnection clauses in EU law and practice”, in Hillion and Koutrakos, *op. cit. supra* note 68, p. 160.

concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.”¹¹⁶

The EU and its Members made clear that the disconnection clause does not affect the rights of third parties.¹¹⁷

One could argue that post-Brexit, the disconnection clauses will simply no longer apply to the UK. As a non-EU State, the UK will become bound by the full range of obligations in the multilateral conventions, irrespective of any existing EU rules governing the subject, and in many cases UK compliance with these agreements may need to be based on domestic UK law, replacing the current EU rules. At the same time, the disconnection clauses seem to have created two separate sets of rules on the basis of which – in the words of Cremona – “the EC/EU and its Member States’ are to be regarded as linked to each other rather than completely independent *vis-à-vis* other Parties.”¹¹⁸ Also in this case, practice will reveal to what extent the UK can easily shift from one regime to the other. Ten years ago, the question was already raised “whether it will always be easy to draw a clear line between ‘legal relations between EU Member States *inter se*’, on the one hand, and their relations towards third States, on the other.”¹¹⁹ Again, it may be difficult to disentangle the UK from the EU regime and to change the relationship with its former fellow EU Member States overnight. And, just like the above-mentioned distinction between EU-only and mixed agreements, also in this case differences will emerge between areas in which the Member States are still

116. Art. 26(3) of the Council of Europe Convention on the Prevention of Terrorism 2005, CETS No. 196. As exemplified by the 2015 Hague Convention on Choice of Court Agreements, the text of a clause may also be more abstract and not refer to the EU expressly: “This Convention shall not affect the application of the rules of a Regional Economic Integration Organization that is a Party to this Convention, whether adopted before or after this Convention – a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organization; b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organization” (Art. 26(6)).

117. This is done in an additional declaration, attached to the Convention: “This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party *vis-à-vis* the European Community/European Union and its Member States, inasmuch as the latter are also parties to this convention ... they will thus guarantee the full respect of the Convention’s provisions *vis-à-vis* non-European Union Parties”.

118. Cremona, *op. cit. supra* note 115, at 171. This idea is supported by the provision in the mentioned Declaration that “the Convention applies fully between the European Community/European Union and its Member States *on the one hand*, and the other Parties to the Convention, *on the other*.” (Emphasis added).

119. Ličková, *op. cit. supra* note 106, at 486.

largely in control and areas that have become subject to (almost) complete harmonization.¹²⁰

4. Conclusion

This contribution focused on two particular aspects of Brexit: the extent to which the UK is competent to negotiate and conclude new agreements to replace the ones concluded by the EU, and the consequences of Brexit for existing international agreements. The main point was that the UK will have to start from scratch in re-developing its international relations, as large parts of it were regulated on the basis of EU external relations law. The existing division of competences as well as the principles of sincere cooperation and primacy also make it difficult for the UK to fully prepare future relations with third States prior to exit day. A special transition arrangement for the UK, either during or after the negotiation period, may be necessary to solve this problem.

As to the existing agreements, it was pointed out that with regard to all existing – EU-only and (bilateral and multilateral) mixed – agreements there are legal obstacles preventing the UK from simply “taking over”. As rightfully noted by Volterra, “there is no ‘one-size-fits-it-all’ solution to this problem. Each mixed EU FTA must be considered on a case-by-case basis. Each is a separate agreement that needs to be interpreted in accordance with its own wording, taking into account its specific context, its object and purpose, as well as any special meaning that the parties might have intended, pursuant to Article 31 of the VCLT.”¹²¹ In most cases renegotiations are in order, or – as in the case of multilateral mixed agreements – at least notifications to inform the other parties of a change in the division of competences. Also in the case of agreements between the Member States, situations may change as the UK will no longer be bound by the rules restraining cooperation of EU Member States *inter se*. As a third State, the UK will most probably occupy a different position in those frameworks. Many of these issues may be dealt with by the agreement negotiated between the UK and the Union on their future relationship. This arrangement could include provisions allowing these agreements to continue to apply with respect to the United Kingdom for a

120. This complexity is exemplified by the Lugano Convention, which was signed by the Community alone (following Opinion of the ECJ, 1/03), but nevertheless refers to the fact that, for EU Member States, internal EU legislation (*in casu* Regulation 44/2001, cited *supra* note 102) applies (Art. 64(1)). See further Cremona, *op. cit. supra* note 115, at 177.

121. Volterra, *op. cit. supra* note 72.

specific period during which the UK will have time to rearrange its external legal relations.

This is not to say that the UK's external relations regimes will by definition be very different compared to what it is now. In a substantive manner it may be possible to copy-paste many of the arrangements that are currently in EU-only agreements. At the same, there may be possibilities for the UK to align itself to the EU's foreign and security policy and to other external policies, and it may continue to contribute to EU military missions. All of this, however, will be done as a non-EU member, and the UK will not only have to be ready to "take back control" in areas in which it was used to leaving international negotiations and participation in international institutions to the EU, but also to "give up control" in the institutions of one of the most influential global actors.